
(2012) 01 BOM CK 0111
In the Bombay High Court
Case No : Criminal Appeal No. 252 of 2010

Manoj Budha Chavan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-01-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2012) BomCR(Cri) 69

Hon'ble Judges : S.B. Deshmukh, J;A.M. Thipsay, J

Bench : Division Bench

Advocate : Satej S. Jadhav holding for Smt. Sadhana S. Jadhav, for the Appellant; S.D. Kaldate, APP for Respondent-State, for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.—The appellant and one Dnyandeo Gopinath Pawar, were the accused in Sessions Case No. 95 of 2008, in the Sessions Court at Latur. The appellant was described as the "accused No.1" and the said Dnyandeo was described as the "accused No.2," in the said case. The charge against the appellant and the said Dnyandeo was of an offence punishable u/s 302 of I.P.C. r.w. Section 34 of I.P.C. The trial held by the Adhoc Additional Sessions Judge-2, Latur, resulted into conviction of the appellant and the said Dnyandeo. The appellant and the said Dnyandeo, both were sentenced to suffer imprisonment for life and also to pay fine of Rs.1000/-each. The appellant being aggrieved by the said order of conviction and sentence, has filed the present appeal.

2. We are informed that the said Dnyandeo has not filed any appeal.

3. The prosecution case projected before the trial court, was as follows:

i) The appellant and the said Dnyandeo are residents of village Nandurga Tanda, Tq. Ausa, District Latur. One Bhaskar Dhansing Pawar was also a resident of the said village.

ii) On 3.6.2008, in the evening, the appellant went to the house of Bhaskar and told him that he had some work with the said Bhaskar and that Bhaskar should come to the house of the said co-accused Dnyandeo. That, Bhaskar accordingly went with the appellant to the house of the said Dnyandeo. Dnyandeo was standing in the ground outside his house. On going there, the appellant questioned the said Bhaskar as to why Bhaskar had, on the previous day, got himself involved in the quarrel, that had taken place with one Raju, son of Bhaskar's brother. The appellant held the said Bhaskar, and the co-accused Dnyandeo gave a blow to Bhaskar in the abdomen by a knife. Bhaskar tried to prevent the blow, as a result of which, he sustained injury on the small finger of his left hand and wrist. As a result of the blow given by the said co-accused Dnyandeo in the abdomen of the said Bhaskar, his intestine came out. The said Dnyandeo again gave a blow with the knife on the back side of the right knee of Bhaskar. In spite of being seriously injured, Bhaskar was trying to run away but collapsed. Bhaskar was taken to the hospital and he regained consciousness on the next day i.e. on 4.6.2008. Thereafter, his statement was recorded by the police, which was treated, as the "first information report".

iii) In the course of investigation, statements of several persons were recorded. The spot panchnama was drawn. The appellant and the said co-accused Dnyandeo were apprehended. The knife, which was the weapon of assault, was recovered on 5.6.2008, by the investigating agency, pursuant to the disclosure statement made by the co-accused Dnyandeo. The clothes of the accused persons and that of the said Bhaskar were also seized.

iv) The statement of Bhaskar was got recorded by the Executive Magistrate on 6.6.2008.

v) Bhaskar succumbed to the injuries on 8.7.2008. His dead body was sent for post mortem examination. The cause of death was opined to be the stab injuries.

vi) Thereafter, the accusation of an offence punishable u/s 302 of I.P.C. was levelled against the appellant and the said co-accused.

4. On completion of investigation, charge sheet was filed against the appellant and the said co-accused and, as aforesaid, the trial resulted in the conviction of both the accused.

5. The prosecution examined 16 witnesses during the trial. The accused persons examined one witness in the defence. Interestingly, we find that a number of prosecution witnesses were examined after the defence witness had been examined.

6. We have heard Mr. Satej Jadhav, the learned counsel for the appellant. We have also heard Mr. Kaldate, the learned APP for the respondent.

7. It is submitted by Mr. Jadhav, the learned counsel for the appellant that, the case against the appellant is based only on the dying declarations. He submitted that there were two dying declarations, one made to API Bansode (P.W. 13) on

4.6.2008, which was treated as F.I.R. and the other made to Mr. Vikrant Gaikwad (P.W. 11) - the Executive Magistrate-on 6.6.2008, both of which were reduced into writing [Exh.73 and Exh.57 respectively]. He submitted that apart from these two dying declarations, there were other dying declarations made to various prosecution witnesses, but these dying declarations had not been reduced to writing by any of those witnesses. He submitted that the version in the dying declarations was not uniform and that it materially differed from one another. He submitted that the version in the dying declarations being conflicting, no reliance, on any of the dying declarations, could be placed. According to him, once the dying declarations were not believed, there was no evidence to convict the appellant.

8. With the assistance of learned counsel, we have gone through the entire evidence, adduced before the trial court. We have perused the impugned judgment and other relevant record.

9. Though 16 witnesses for the prosecution were examined during the trial, there was no eye witness to the incident of assault. There was only one witness i.e. Madhukar (P.W.4), who claims to have seen a part of the incident. Thus, it is a fact that case against the appellant and even against the co-accused is mainly based on the dying declarations. So far as the co-accused Dnyandeo is concerned, there is some other circumstantial evidence against him, apart from the dying declarations, but so far as the appellant is concerned, except the dying declarations, there is not much against him.

10. A number of contentions have been raised by Mr. Satej Jadhav, the learned counsel for the appellant regarding the unreliability of the evidence adduced by the prosecution and more particularly the evidence in respect of the dying declarations. Apart from his contention about the version in the dying declarations not being uniform, he also submitted that there was serious doubt as to whether the oral dying declarations, as claimed by some of the prosecution witnesses, had, indeed, been made by the said Bhaskar. He further submitted that even otherwise, that Bhaskar was in a fit state of mind, at the time when such dying declarations-including dying declarations recorded in writing-were, allegedly, made is doubtful from the evidence of the medical witnesses, including that of the defence witness. He also raised some legal issues in the light of judicial pronouncements of this court, dealing with the aspect of appreciation and acceptability of the evidence of dying declarations, in cases involving multiple dying declarations, containing different versions.

11. It would be proper to notice at this stage that the role attributed to the appellant in the alleged offence is different from that attributed to the co-accused Dnyandeo. The prosecution case itself projects the said Dnyandeo, as the main accused. There is no variance in the case of the prosecution, revealed through the evidence of different witnesses, -who might have disagreed on some other points -that the actual assailant is the co-accused Dnyandeo only. The allegation against the appellant is only that the assault on Bhaskar, as was done by the said

co-accused Dnyandeo, was in furtherance of the common intention of the said Dnyandeo and the present appellant. Thus, the appellant was prosecuted and has been held guilty on the basis that he shared the common intention with the said co-accused Dnyandeo, to kill Bhaskar. Apart from the difference in the nature of role, that has been attributed to the appellant and the said co-accused Dnyandeo, there is also a difference in the nature of evidence that has been adduced against the appellant, and that against the said co-accused. Undoubtedly, the multiple dying declarations in this case do involve the appellant also, in addition to the said co-accused Dnyandeo, but we find that against Dnyandeo, there was some other evidence also. Since Dnyandeo has not filed any appeal, in our opinion, it would not be necessary to judge the merits of his conviction, particularly because, the evidence against the appellant and that against the co-accused is not the same. The role attributed to the appellant, in the alleged offence, being lesser and the nature of evidence adduced against him also being of less volume, we think it fit to restrict the examination of evidence so far as it relates to the merits of the conviction of the appellant. Undoubtedly, certain evidence being common against the appellant as well as the said co-accused Dnyandeo, the same would need scrutiny, and such scrutiny may have a bearing on the determination of the guilt or innocence of the said co-accused also. However, apart from such discussion of the evidence, which would be inevitable, we do not propose or intend to focus on the evidence, so far as it would relate to the merits of the conviction of the said co-accused Dnyandeo.

12. We may now proceed to examine the evidence in respect of the dying declarations. As aforesaid, however, we would examine the dying declarations, primarily from the angle of the case against the present appellant.

13. It would be appropriate to first examine the version in the dying declarations of Bhaskar that were reduced to writing.

14. The first dying declaration in point of time is the one recorded by API Bansode (P.W.13). The said dying declaration was recorded on 4.6.2008, in the Civil Hospital at Latur. The Medical Officer, who certified the fitness of Bhaskar, before recording the said dying declaration, is Dr. Jayashree (P.W.10). In this dying declaration, the record of which is at Exh.73, Bhaskar has implicated the appellant by giving him an active role. As per the version in this dying declaration, the incident took place at about 6.45 p.m. on 3.6.2008. That, Bhaskar had come back to his house after having worked in the field and that at that time, the appellant came to his house and said that he (appellant) had some work with him (Bhaskar). Saying so, the appellant asked him to come along with him (appellant) to the house of the co-accused Dnyandeo Gopa Pawar. That, thereafter, both of them went there. That, Dnyandeo was present in the ground opposite his house. That, on going there, the appellant asked Bhaskar as to why he got himself involved in the quarrel that had taken place with one Raju, son of appellant's brother. That, the appellant then held Bhaskar and the co-accused Dnyandeo stabbed Bhaskar with a knife. When Bhaskar tried to avoid the blow,

he sustained an injury on the small finger of his left hand and the wrist. Because of the stab given to Bhaskar, his intestine came out. Bhaskar held the same by his hands and ran away outside. That, co-accused Dnyandeo again gave a blow by the knife on the back side of the left knee of Bhaskar.

15. Coming to the other dying declaration, which was reduced to writing (Exh.57), the same was recorded on 6.6.2008. It has been recorded by the Special Executive Magistrate Shri Vikrant Gaikwad (P.W.11). The Medical Officer, who certified the fitness of Bhaskar to make the said statement, at that time, is Dr. Manisha Mundhe (P.W.9).

16. We have gone through the version of Bhaskar, as reflected in Exh.57. As per this, the incident took place at about 5.00 to 5.30 p.m. on 3.6.2008. That, at that time, Bhaskar was returning to his house from his field and while on the way, he was sitting below the Umari tree; and that the appellant came there and told Bhaskar that he (appellant) had some work with Bhaskar and on saying so, he took Bhaskar to the house of co-accused Dnyanu Pawar. That, Dnyanu Pawar was sitting there. Bhaskar started telling Dnyanu Pawar as to why he was quarreling and that he should not quarrel, but Dnyanu Pawar questioned him as to what authority he had to tell so to Dnyanu Pawar and saying so, Dnyanu Pawar stabbed Bhaskar in his abdomen by a knife (sura), which Dnyanu Pawar had kept hidden in his Dhotar. That, Bhaskar shouted and therefore, the persons from the neighbourhood gathered there. That, Bhaskar was put in a jeep, the matter was reported at his residence; and then he was taken to the Government Dispensary at Killari and then to the Government Dispensary at Latur.

17. One can easily notice that there is a material variation in the version in Exh.73 and the version in Exh.57, at least on three important aspects. The first is regarding the place, from where Bhaskar was, allegedly, taken by the appellant. The second is regarding the time as to when he was taken, and the third is-which is the most important, in the context of the present appellant - regarding the role attributed to the present appellant in the incident. While Exh. 73 reflects the version that the appellant had caught hold of Bhaskar thereby facilitating the blow to be given to him; the version in Exh.57 is that the appellant had (merely) called Bhaskar to the house of Dnyandeo Pawar.

18. In our opinion, this variation is quite significant. It is nobody's case that the appellant was the assailant. The case against him is that he shared the common intention with the co-accused Dnyandeo to kill Bhaskar and that therefore, for the said criminal act of stabbing, he is also liable by virtue of Section 34 of I.P.C. whether a particular person shared a common intention with another person, would largely be a matter of inference to be drawn from the facts of the case. Though, ordinarily, a person who holds the victim, and thus facilitates the blow to be given by another, would be believed to have shared the common intention with that another, if the overt act attributed to him, viz-of holding of victim at the time of assault-, is excluded, it may not be possible to draw an inference of his having shared the common intention with the actual assailant. Thus, in such a

case, it would be essential that this overt act is satisfactorily proved, before drawing such an inference.

19. In our opinion, therefore, in judging the merits of the conviction of the appellant, what role was played by him in the alleged incident would be crucial. Though, the learned counsel for the appellant has contended that the dying declarations, which are not consistent, are liable to be rejected and though he has sought to support his contentions by raising several factual issues, as appearing from the evidence and by making submissions on the legal position, we find it unnecessary to go that deeper into the matter for deciding the merits of the conviction of the appellant. Certainly, such deeper examination would have been necessary, if we were to adjudicate upon the guilt or innocence of the co-accused Dnyandeo also.

20. After noting the variance in the aforesaid dying declarations, particularly with respect to the role attributed to the appellant, we proceed to examine the evidence of Madhukar (P.W.4), who claims to be an eye witness to some part of the actual incident of assault. He is the first one to reach near Bhaskar, after he had fallen down as a result of the assault by Dnyandeo. Madhukar (P.W.4) is the resident of the same village i.e. village Nandurga-Tanda. His version is that on the relevant date, he was standing in front of his house at about 6.30 p.m. when he heard a cry as "Melo" coming from the side of the house of the co-accused Dnyandeo Pawar. On hearing this, he rushed towards that side and saw Bhaskar was running by holding two hands on his abdomen. Madhukar saw him falling. Madhukar also saw that co-accused Dnyandeo was following Bhaskar and had given a blow by knife on the knee joint of Bhaskar. So far as the appellant is concerned, the only statement which Madhukar makes is, "Manoj was also running behind Bhaskar".

21. We may now refer to the evidence in respect of oral dying declarations made by Bhaskar. There are four witnesses, who say that such dying declarations were made to them by Bhaskar. They are Ganpati (P.W.1), brother of Bhaskar, Rajendra (P.W.5) nephew of Bhaskar, Ushabai (P.W.6) wife of Bhaskar and Shalubai (P.W.8) sister of Bhaskar.

22. According to Ganpati (P.W.1), in the hospital at Latur, Bhaskar spoke to him and said that Manoj i.e. the appellant had caught hold of him and Dnyanu had given a blow. According to Rajendra (P.W.5), who is the son of Ganpati, he had a discussion with Bhaskar in the hospital when Bhaskar told him that Manoj had held him and Dnyanu had stabbed him. According to him, this had happened on the next date of the incident. Ushabai, (P.W.6)-wife of Bhaskar, has also stated about Bhaskar having told her that Manoj had caught hold of him and Dnyanu had thrust a Sura. It is rather curious to note that Ushabai -though is not an eye witness to the incident,-has narrated the incident in her examination in chief, as if she had been an eye witness thereto. Shalubai (P.W.8) also speaks of the dying declaration made to her by Bhaskar after regaining consciousness on the next day after he had been admitted in the hospital. According to her, Bhaskar told

her that Manoj (appellant) had caught hold of Bhaskar and Dnyandeo gave a blow by means of Suri in the abdomen.

23. Thus, the oral dying declarations are made to Ganpati (P.W.1), Rajendra (P.W.5), Ushabai (P.W.6) and Shalubai (P.W.8) are, by and large, in conformity with the dying declaration recorded by A.P.I. Bansode (P.W.13).

24. It however, follows that they are not in conformity with the version reflected in the dying declaration (Exh.57), recorded by the Executive Magistrate, Gaikwad (P.W.11).

25. Shalubai states that Madhukar Pawar had come to the house and had disclosed about the incident. Her evidence shows that Madhukar had already told this witness, immediately after the incident, that Dnyanu, co-accused had given a blow of Suri to Bhaskar. Ushabai, however, states that Madhukar informed her about the co-accused Dnyandeo and the present applicant, both having assaulted Bhaskar.

26. Since Madhukar appears to be the person, who had informed the wife and sister of Bhaskar, about the assault and who claims to be an eye witness to a part of the assault, his evidence needs to be examined on the aspects, other than the dying declarations also. One significant aspect is that he is the one, who had contacted the police immediately after the incident. At that time, Bhaskar was conscious, though he was unable to speak. According to Madhukar, he was crying. Madhukar has also given the name of the police station officer, who had attended the call given by Madhukar, informing about the incident.

27. Two aspects emerge from the evidence of Madhukar. They are very significant. The first is that the police had already arrived at Nandurga Tanda at about 7.00 to 7.30 p.m. on the day of the incident itself :-i.e. on 3.6.2008. Madhukar clearly stated so and added that police had taken Manoj and Dnyandeo in custody at that time itself: i.e. in the evening of 3.6.2008. The second is that Madhukar had already informed the police that appellant and Dnyandeo had given blows by means of Suri to Bhaskar. This is consistent with the fact of police having taken the appellant and said Dnyandeo in custody on 3.6.2008 itself, as Madhukar had already given them information about the involvement of the appellant and the said Dnyandeo.

28. Now, what Madhukar had seen with respect to the appellant is only that "he was also running behind Bhaskar". Madhukar had, admittedly, not witnessed anything more. In spite of this, he told the police about the appellant also, as one of the assailant, which clearly is an inference drawn by him. It cannot be construed as a statement of fact. The statement of fact is only that the appellant was also running behind Bhaskar.

29. It appears to be more probable than not, under the circumstances, that the police had taken the appellant and other accused in their custody on the same day :-i.e. on 3.6.2008 in the evening at about 7.00 to 7.30 p.m. API Bansode

(P.W.13) did claim that he had arrested both the accused persons only on 4.6.2008 after the crime had been registered, but, no panch witness in respect of the arrest of the appellant and even the co-accused, have been examined.

30. Undoubtedly, a number of contentions have been raised by the learned counsel for the appellant about the unreliability of the dying declaration and there is considerable substance in those contentions. However, so far as the appellant is concerned, it may not be necessary to discuss all these contentions. It is sufficient to keep in mind the following facts, which emerge from the evidence.

i) There is a material variation and difference between the version in Exh.57 and Exh.73

ii) The role attributed to the appellant in Exh.57 is only of calling the deceased at a particular place, where he was assaulted by co-accused; while the role attributed to him in Exh. 73 is of holding victim at the time of assault by the co-accused.

iii) There is a difference in the version in Exh.57 and Exh.73, as regards the time and place of the incident.

iv) Madhukar (P.W.4) had seen the appellant running behind victim-Bhaskar. He had not seen him doing anything else.

v) In spite of this, Madhukar informed the police on 3.6.2008 itself that co-accused Dnyandeo and the appellant both had assaulted the said Bhaskar. Admittedly, till that time, Bhaskar had not made any such statement or declaration to anyone and Madhukar had also not seen the appellant playing any role in the assault.

vi) The police had already taken the appellant and said Bhaskar in their custody at about 7.30 p.m. on 3.6.2008 itself, on the saying of Madhukar.

vii) The witnesses, to whom the oral dying declarations were allegedly made by Bhaskar on 4.6.2008 had already been informed by Madhukar about the involvement of the appellant in the assault of Bhaskar.

31. These facts when considered together raise a doubt, that, perhaps, the appellant was shown to be involved in the alleged offence based on the inference drawn by Madhukar and expressed by him to the police; and that, after having taken the appellant in custody in the evening on 3.6.2008 itself (which was before registration of the offence), or at any rate, after having already formed a belief about his involvement in the matter, the subsequent investigation proceeded only in that direction and was kept in conformity with the initial belief of the investigating agency.

32. Though we avoid a detailed discussion on the evidentiary value of the different dying declarations that are available in this case and the collective effect of such evidence, it would not be out of place to compare the record at Exh.73

with the record at Exh.57. Exh.73 is such a well structured document, that it would be difficult to believe that it contains an accurate record of the utterances made by Bhaskar. In this statement, Bhaskar is supposed to have given full names of the appellant as well as the co-accused Dnyandeo and described them as residents of Nandurga Tanda. The words found in these dying declarations, are not likely to have been uttered by the said Bhaskar, judging by the condition in which he was. The least that can be said is that, apparently, the statement had been edited by the recorder. The document at Exh.57 appears to be more reliable as the record of what Bhaskar stated. It is a debatable issue as to whether reliance can be placed on one dying declaration when there are two dying declarations containing different versions and at any rate, there is some authority for the proposition that in such a situation, both the dying declarations should be rejected -as a matter of prudence, though not of law. However, even if such a comparison is made in this case between the version in Exh.73 and the version in Exh.57, the likelihood of the document at Exh.57 being more reliable than the document at Exh.73, is apparent.

33. Anyway, without going into that aspect, what cannot be overlooked is that there were two different versions about the role played by the appellant in the alleged offence. One was merely of bringing the deceased to the spot, where he was assaulted by the other accused and the other of holding him at the time of assault. Even assuming that it would not be proper or permissible to hold the version in Exh.73 to be more reliable than the version in Exh.57, the fact remains that when there is a doubt in that regard, the version implicating the appellant in a lesser degree, has to be preferred. It is particularly because the appellant initially came to be involved on the basis of what Madhukar stated, and what Madhukar had seen was only that the appellant was running behind Bhaskar. Though Madhukar had interpreted this as showing the involvement of the appellant in the assault, objectively, this, by itself, would be wholly insufficient to show that the appellant shared the common intention with co-accused Dnyandeo to kill the said Bhaskar.

34. Even assuming that the appellant had indeed called Bhaskar to the house of the co-accused Dnyandeo, where Dnyandeo assaulted him, it would not be possible to infer from this fact alone, that the appellant and Dnyandeo had formed a common intention to kill Bhaskar and that the assault on Bhaskar by Dnyandeo was in furtherance of such common intention. It is well settled that whether two or more persons formed a common intention, is an inference to be gathered from the facts of each case. Even mere presence on the spot, at the time of incident, can be the evidence of common intention, if it is indicated that the purpose of such presence was for facilitating or promoting the offence. It is also true, that though the common intention presupposes a prearranged plan some time, it can be conceived on the spur of the moment. Also, merely because one of the accused was a silent spectator and took no part in the assault, it cannot be said that he did not entertain the common intention with the other or others. Thus, though no fixed formula can be applied to judge the existence of

common intention in a given case, it is equally true that mere presence on the spot, at the time of incident, will not automatically tantamount to sharing of common intention. In this case, there are no factors which would indicate, by the requisite standard and beyond reasonable doubt, that the appellant had shared any common intention with the said Dnyandeo to kill Bhaskar. There is no claim, much less any evidence, that Bhaskar and the appellant were on inimical terms. There is no evidence of any motive on the part of the appellant to have desired the death of Bhaskar. The appellant was, admittedly, not armed with any weapon. There is nothing to show that he was aware that Dnyandeo was possessing any weapon. His subsequently running from the place of incident i.e. after the assault, could very well be a reaction of fear caused due to the happening and cannot be held as a factor showing the sharing of common intention with the co-accused.

35. The circumstance of blood stains having been found on the clothes of the appellant is also not reliable. The evidence of Madhukar indicates that the appellant had been taken in the custody on the very day and therefore, the subsequent recovery of the clothes containing blood stains from his house on 6.6.2008 is open to doubt. Moreover, if the appellant was present on the scene of the offence, there would be a possibility of his clothes becoming blood stained, because of his being physically close to victim Bhaskar. Thus, apart from the question of reliability, this circumstance, in this case is not very significant because, in all probability, the appellant was present on the scene of offence at the time of incident.

36. In our opinion, the appellant deserves to be given benefit of doubt. There were no circumstances indicating that he shared the common intention with the co-accused to kill Bhaskar. It must be realized that even while drawing an inference of sharing of common intention, if there exists a doubt, the accused would be entitled to the benefit thereof.

37. We have come to this conclusion without deeply going into the question of reliability of the evidence of dying declarations, as we have thought it not necessary. We may only say that we have not expressed any opinion with respect to the merits of the case in respect of the case of the co-accused Dnyandeo, though some discussion regarding reliability of the dying declarations became inevitable from the point of view of the involvement of the appellant in the alleged offence. We have also not considered whether the conviction of the co-accused Dnyandeo is proper and legal. We have proceeded on the basis that "even assuming Dnyandeo had indeed assaulted Bhaskar, whether the appellant could be said to have shared the common intention with him on the basis of the evidence adduced before the trial court." We have examined the dying declarations only in the limited context of judging the role attributed to the appellant and from the point of view as to whether the role which may be safely attributed to him on the basis of the evidence, was sufficient for recording the finding that he shared the common intention with the co-accused.

38. As a result of the aforesaid discussion, we are inclined to allow the appeal.

39. The appeal is allowed. The impugned judgment and order of conviction is set aside. The appellant is acquitted. He be set at liberty forthwith, unless required to be detained in any other case.

40. Fine, if paid, be refunded to the appellant.